

Waka Umanga (Māori Corporations) Bill

17 October 2007

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
WAKA UMANGA (MĀORI CORPORATIONS) BILL

PURPOSE OF THIS ADVICE

1. The purpose of this report is to provide final advice on the consistency of the Waka Umanga (Māori Corporations) Bill ('the Bill') (PCO 7687/10), with the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). We understand that the Bill is to be considered by the Cabinet Legislation Committee at its meeting on Thursday 18 October 2007.
2. This advice constitutes full advice incorporating relevant parts of our preliminary advice on the Bill, delivered to you in March of this year.
3. We have concluded that the Bill appears to be consistent with the Bill of Rights Act. In reaching this conclusion, we have considered possible inconsistencies with freedom of expression, freedom from discrimination on the basis of race and age, rights of minorities, and the presumption of innocence.

PURPOSE OF THE BILL

4. The Bill provides for the establishment of new legal entities by tribal groups or Māori associations. These entities are able to be structured to meet the organisational needs of tribal groups and other Māori associations that manage communal assets.
5. The Bill seeks to provide a new governance entity, a waka umanga, that:
 - * is specifically shaped to meet the organisational needs of Māori collectives that manage collectively owned assets;
 - * provides a process for forming an entity and resolving tribal formation disputes;
 - * provides a mechanism for a tribal group to gain legitimate representative status for purposes specified in its charter;
 - * is flexible enough to meet the cultural needs of Māori collectives; and
 - * provides certainty to Māori, the Crown and third parties.

6. The Bill establishes two different types of waka umanga. A waka pū is a waka umanga registered for a tribal group (i.e. a group that descends from 1 or more common named ancestors). A waka tumaha, on the other hand, is a waka umanga registered for a Māori association in which the members do not descend from a common tribal ancestor but:

- a) has a membership that is predominantly Māori;
- b) supports Māori culture and tikanga;
- c) has communal assets; and
- d) whose purpose is to provide a range of services or benefits for its community.

SUMMARY OF ADVICE

Freedom of Expression

7. The Bill requires the Registrar of the Waka Umanga to be satisfied that the proposed name for the Waka Umanga meets certain criteria. In our view, these criteria are consistent with section 14 of the Bill of Rights Act. The Bill also requires a Governor of a waka umanga to disclose any material financial interests, including interests of close relatives. To the extent that this provision might restrict freedom of expression, it appears to be necessary to promote transparency and accountability. Any discrimination on the basis of family status would be justified for the same reason.

Freedom from Discrimination

8. Membership of a waka umanga must be at least predominately Māori. Although the Bill draws a distinction on the basis of race it does not appear to create any disadvantage for Māori or non-Māori, and in our view does not discriminate on the basis of race. The Bill does not permit people under the age of 18 to be registered members of a waka umanga or to hold the office of Governor of a waka umanga (unless a waiver is granted). We note the responsibility for decision-making or holding office as Governor of an organisation of this type requires a high degree of maturity. Hence, our opinion is that, if any discrimination exists, it can be justified under section 5 of the Bill of Rights Act.

Rights of Minorities

9. Restrictions on the membership of waka umanga could be perceived as a restriction on the rights of minorities to enjoy their culture. In our assessment, the Bill does not unduly limit any rights of minorities to enjoy their culture. We note that the rights of Māori to reach their aspirations and efficiently manage their assets are central to the purpose of the Bill.

Presumption of Innocence

10. The Bill contains a number of strict liability offences which can raise an issue of inconsistency with the presumption of innocence. We have concluded that the strict liability offences in the Bill appear to be justifiable.

POSSIBLE INCONSISTENCIES WITH THE BILL OF RIGHTS ACT

Freedom of Expression

11. Section 14 of the Bill of Rights Act affirms that:

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

Naming of Waka Umanga

12. Clause 27 of the Bill requires the Registrar of the waka umanga to be satisfied that the proposed name for the waka umanga meets certain criteria outlined in the paragraph below. In our view, the choice of name is a form of expression for the purpose of section 14 of the Bill of Rights Act. Clause 27 of the Bill appears to confer discretion on the Registrar of the waka umanga as to whether or not to approve a name. The Registrar would be required to exercise that discretion in a manner that is consistent with section 14.
13. Clause 27 of the Bill, which relates to applications for the registration of waka umanga, requires the Registrar of the waka umanga to be satisfied that :
 - the proposed name for a waka umanga is not identical or almost identical to the name of any existing registered entity including a waka umanga, or a name reserved under the Companies Act 1993;
 - the proposed name is not, in the opinion of the Registrar, inappropriate; and
 - the use of the proposed name would not contravene any enactment.
14. If the Registrar is not satisfied of the above factors, the Registrar may return the application for registration to the applicant for amendment or request further information from the applicant. In addition, clause 33 allows the Registrar to direct that a waka umanga apply to change its name if the Registrar believes on reasonable grounds that the waka umanga should not have been registered under its particular name. Consequently, it appears an applicant's ability to choose a name for a waka umanga is limited to those names that satisfy the requirements in clause 27.
15. In our view, the choice of name is a form of expression for the purpose of section 14 of the Bill of Rights Act. We consider, however, the requirements of clause 27 appear to be reasonable to avoid confusion, offence or breach of the law.

Disclosure Requirements

16. Clause 41 of the Bill requires a Governor of a waka umanga to disclose any significant benefits or material financial interests in a transaction relating to the waka umanga. This provision might limit freedom of expression but can be justified because it is necessary to promote transparency and accountability in the management of the waka umanga. For convenience, we note here that clause 41 could also be seen as discriminatory on the basis of family status because the obligation to disclose financial interests extends to the financial interests of the Governor's close relatives. This can be justified on the same grounds of transparency and accountability.

Freedom from Discrimination

17. Section 19(1) of the Bill of Rights Act provides the right to freedom from discrimination on the grounds set out in section 21 of the Human Rights Act 1993. These grounds include race and age. In our view, taking into account the various domestic and overseas judicial pronouncements as to the meaning of discrimination, the key questions in assessing whether discrimination under section 19 exists are:

i) Does the provision draw a distinction based on one of the prohibited grounds of discrimination?

ii) Does the distinction involve disadvantage to one or more classes of individuals?

18. If these questions are answered in the affirmative, we consider that the provision gives rise to a prima facie issue of "discrimination" under section 19(1) of the Bill of Rights Act. Where this is the case, the provision is required to meet the justified limitation test under section 5 to remain consistent with the Bill of Rights Act.

Discrimination on the Basis of Race

19. Membership of a waka pū is limited to tribal groups and membership of a waka tumaha must be predominately Māori. Although, the Bill clearly draws a distinction on the basis of race, our view is that it does not appear to create any disadvantage for a particular group. The Bill is intended to address particular issues related to governance of Māori organisations, hence is more specifically tailored for the unique circumstances, nature and needs of Māori. For this reason it is unlikely to be an applicable model for non-Māori organisations, for which other organisational models are available. Nor does the Bill require Māori groups to adopt the waka umanga as a governance model. Accordingly, our view is that the Bill does not create any disadvantage to Māori or non-Māori and therefore does not give rise to discrimination on this ground.

Discrimination on the Basis of Age

20. Clause 4 of the Bill defines an 'adult' as a person of 18 years or older. Only adults are able to be registered members of a waka umanga. Registered members can participate in waka umanga affairs, and have voting rights. Also, clause 1 of Schedule

2 does not permit people under the age of 18 to hold the office of Governor of a waka umanga.

21. We have considered whether these clauses give rise to discrimination on the basis of age, which the Human Rights Act 1993 defines as any age commencing with the age of 16 years. Age limits of any kind are likely to involve a degree of arbitrariness or generalisation without regard for the particular circumstances of individuals within that age group. Nevertheless, the choice of 16 as a starting point under the Human Rights Act means that any differential treatment based on an age over 16 that results in disadvantage is *prima facie* inconsistent with the right to freedom from discrimination. It is therefore necessary to consider whether these clauses can be justified in terms of section 5 of the Bill of Rights Act.
22. Participating in decision-making or holding office as Governor of an organisation of this type requires a high degree of maturity. In particular the position of Governor is one of trust. Setting a threshold based on age is designed to ensure responsible decision-making. The age limit of 18 years is consistent with other similar legislation such as the Companies Act 1993. We also note that, under clause 2 of Schedule 2, a rūnanganui or registered member of a waka umanga can seek a waiver from the Māori Land Court that would allow a particular individual to be a governor despite being under 18 years old. Accordingly our view is, to the extent that a person under 18 years old could suffer some disadvantage, giving rise to a *prima facie* issue of discrimination, it can be justified under section 5 of the Bill of Rights Act.

Rights of Minorities

23. The Report of the Law Commission, which proposed the development of the waka umanga framework, suggested that if membership rules of a waka umanga unduly restrict the criteria for membership, such restrictions could constitute a denial of the right of minorities affirmed in section 20 of the Bill of Rights Act.^[1] Section 20 states that:

A person who belongs to a ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practice the religion, or to use the language, of that minority.

24. In our assessment, the Bill does not unduly limit any rights of minorities to enjoy their culture. We note that the rights of Māori to pursue their aspirations and efficiently manage their assets are central to the purpose of the Bill.

Presumption of Innocence

25. Section 25(c) of the Bill of Rights Act provides that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law. The right to be presumed innocent requires that an individual must be proven guilty beyond reasonable doubt, and that the state must bear the burden of proof.^[2]

26. Clause 122 of the Bill contains several strict liability offences. Strict liability offences raise a *prima facie* issue of inconsistency with section 25(c) because, once the prosecution has proven the defendant committed the act in question, the defendant must prove the defence (in this case, that he or she took reasonable steps to comply with the Act) on the balance of probabilities to escape liability. In other criminal proceedings a defendant must merely raise a defence in an effort to create reasonable doubt. Where a defendant is unable to prove the defence for a strict liability offence then he or she could be convicted even if reasonable doubt exists as to her or his guilt.
27. The strict liability offences in the Bill appear to be justifiable under section 5 of the Bill of Rights Act. The offences contained in the Bill are regulatory in nature and are generally designed to help enforce obligations imposed on waka umanga by other parts of the Bill. Generally the courts have accepted that there is a distinction between "truly criminal offences" and "public welfare regulatory offences".^[3] A reversal of the onus of proof is mostly considered to be more easily justifiable for regulatory offences. Those who choose to enter into a regulated environment should be expected to meet certain standards of care.^[4]
28. Strict liability offences can also be justified where the offence turns on a particular matter that is peculiarly within the knowledge of the defendant. In such cases, it is easier for the defendant to explain why he or she took (or failed to take) a particular course of action than it is for the Crown to prove the opposite. In this case, the defendants are in a better position to explain why they failed to comply with the necessary regulatory requirements. We also note that the maximum penalty levels set out in the Bill (between \$2000 and \$10,000) are within an acceptable range for offences of this type.

CONCLUSION

29. Based on the analysis set out above, the current draft of the Waka Umanga (Māori Corporations) Bill appears to be consistent with the rights and freedoms set out in the Bill of Rights Act.

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Footnotes

1 *Waka Umanga – A Proposed Law for Māori Governance Entities* (Law Commission Report 92, May 2006), 45.

2 *R v Wholesale Travel Group* 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103

3 *Civil Aviation Authority v MacKenzie* [1983] NZLR 78

4 R v Wholesale Travel Group (1992) 84 DLR (4th) at 213

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